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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1974

No. 74-82

KITTYHAWK, LT'D.
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.
Petitioners,

v.

CITY OF MIDDLETOWN
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON
Respondents.

BRIEF OF RESPONDENT CITY OF MIDDLETOWN OPPOSING CERTIORARI

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STATEMENT OF THE CASE MADE TO CLARIFY PETITIONERS' STATEMENT THEREOF

Under the zoning ordinance of the City of Middletown a C-3 commercial district is located at the northeast corner of Breiel Boulevard and Grand Avenue. The property owned by Petitioner Kittyhawk, Lt'd. is in a C-2 commercial

district, located at the southeast corner of Briel Boulevard and Grand Avenue, which is of the same approximate size as the C-3 district at the northeast corner. Opposite these two districts, on the west side of Briel Boulevard are C-1 and other C-2 commercial districts (not shown on Petitioners' sketch p. 6). Petitioners' property comprises the east part of the C-2 district in which it is situated and has no frontage on Breiel Boulevard but has access to that street by means of Lewis Street, a public street which has its eastern terminus at Petitioners' west property line, approximately 200 feet from Briel Boulevard.

In July, 1972, Petitioner Kittyhawk submitted plans for a commercial building for its property to the Zoning Administrator of the City of Middletown. The zoning ordinance of the City requires that a "Certificate of Zoning Compliance", certifying that the proposed uses are proper, must be obtained from the Zoning Administrator and then presented to the Commissioner of Inspection (Building Commissioner) before that official issues a building permit for the structures which will house the use or uses. The plans, among other things, showed that the proposed building would be occupied by a supermarket, a drug store, a fabric center and a tile and carpet store. The Zoning Administrator, at the trial of this case, testified that he informed Petitioner Kittyhawk's contractor (who applied for the certificate) that the the supermarket and drug store were proper uses but that the fabric center and the tile and carpet store were not. He then issued a Certificate of Zoning Compliance for "a commercial building" without specifying what uses were to be housed therein. This was presented to the Commissioner of Inspection, who thereupon issued the building permit and construction was thereafter started.

When the building was approximately half completed,

the owner, Kittyhawk, and the prospective tenants, the drug store and the tile and carpet store, for reasons not shown at the trial of this case, declined to enter into leases and Kittyhawk then obtained Petitioner Esco Distributing Co., a discount catalog store which is first permitted in a C-3 district. The latter required greater space for its operation and the building plans were altered to accommodate this requirement.

Petitioner Kittyhawk's contractor then presented amended building plans to the Commissioner of Inspection, as required by the Building Code of the City, but failed to first obtain a new Certificate of Zoning Compliance from the Zoning Administrator. The Commissioner of Inspection issued a new building permit but, as he testified at the trial, he told Kittyhawk's agent to "contact zoning and clarify the Esco use." Petitioner did not do this.

While the building was still under construction, the Zoning Administrator delivered a written notice to Petitioners that the Esco use and the fabric store would be in violation of the zoning ordinance. Thereafter, in October, 1972, the City filed this action to enjoin Petitioners from using the building for these purposes. The propriety of the A & P grocery store in the building was not questioned by the City.

FURTHER REVIEW, RESPONDENT SUBMITS, IS NOT JUSTIFIED

1. The Middletown Zoning Ordinance is in accord with the tests set out in Euclid v. Ambler Realty Co. 272 U.S. 365.

On Pgs. 9-10-11 of their Petition Petitioners place heavy emphasis on the words "highway associated demands" used in connection with uses permitted by the zoning ordinance in the C-2 district in which their property is situated. But they fail to mention that *all uses permitted in a C-1 district* are also permitted in their C-2 district.

Thus, the uses permitted in a C-2 zone are:[1]

> (1) bakery shops, beer and wine carry-outs, candy shops, delicatessens, drug stores, groceries and markets, magazine and newsstands, meat, fruit and vegetable markets and tobacco shops; barber and beauty shops, dry cleaning and laundry pick-up stations, funeral homes and mortuaries including emergency ambulance service, laundromats, professional offices, shoe repair, talent instruction, branch banks and loan institutions and real estate and insurance offices; ice cream parlors and soda fountains, pizza houses, tea rooms, restaurant and lunch rooms, service stations and repair, shopping groups and "any other retail business or service which is determined by the Planning Commission to be of the same general character as the above uses";
>
> (2) sale of building materials, farm produce stands, farm implements mobile home sales, nurseries, including greenhouses, trailer sales, beer and wine carry-outs and pottery and souvenir shops; business and professional offices, lawn and garden equipment rental

[1] Secs. 1139.02 and 1141.02 of the Zoning Ordinance (P. 17-18-22-23 Petitioners' Appendix)

> and service, appliance and business machine service, motels, animal clinics and kennels, indoor and outdoor motion picture theaters, post office branches and transient mobile home parks or courts, truck stops, banquet halls and private clubs, auto parts sales, vehicle rental and storage, automatic car washes and any other business or service which is "determined by the Planning Commission to be of the same general character as the above-permitted uses."

Consequently, the emphasis by Petitioners on the words "uses catering primarily to highway-associated demands" is not a fair treatment of the subject of what uses are actually permitted in a C-2 district, when it is readily seen from the nature of these uses permitted on their property that many of these do not necessarily cater to "highway associated demands".

In fact, since *all* uses permitted in a C-1 zone are also permitted in a C-2 zone it must be said that the intent of a C-2 zone also encompasses the intent of a C-1 zone, which is "to have low-intensity, enclosed uses providing primarily convenience goods and personal services *for persons residing in the adjacent residential areas.*"[2]

On the other hand, the intent of a C-3 district is:

> "to have *high intensity* enclosed uses providing both convenience goods and major shopping needs *for the entire city or a major portion thereof.*"[3]

Petitioners Esco Distributing Co. and Miles Fabrics of Memphis are "high intensity uses providing major shopping needs for the entire City or a major portion thereof". In fact, in the record is the testimony of Esco's officer that

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[2] Sec. 1139.01 of the Zoning Ordinance (Petitioners' Appendix)

[3] Sec. 1143.01 of the Zoning Ordinance.

his store had printed 50,000 catalogues and had distributed these in the City of Middletown, the City of Franklin and the City of Lebanon and in the parts of Butler County and Warren Counties which lie between these cities, and that the intent was to keep Middletown residents from "going to Cincinnati and Dayton to shop."

In addition to the C-1, C-2 and C-3 districts provided in the zoning ordinance there are also C-4 and CBD (Central Business District), the latter two also providing wide-area shopping needs.

The trial court, in finding the ordinance invalid as it attempted to impose different commercial use restrictions upon these various commercial districts, did so *solely* upon the basis of similarity of some uses permitted in one district to those permitted in another. But for each of these commercial districts there are other regulations in addition to the *use* regulations recited above. It was these other regulations which the trial court (so found by the Court of Appeals[4]) overlooked. There are maximum sizes for stores in C-1 and C-2 districts and none for those in C-3, C-4 or CBD.[5] There are height regulations for each,[6] building set-back lines and yard areas,[7] and off-street parking requirements,[8] all differing for the respective districts and all in proportion to the use regulations for the districts.

All of these factors justify the "classification distinctions

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[4] P. 54 of Petitioners' Appendix.

[5] Secs. 1139.09, 1141.09, 1143.09 of the Zoning Ordinance (Petitioners' Appendix).

[6] Secs. 1139.08, 1141.08, 1143.08 of the Zoning Ordinance.

[7] Secs. 1139.08, 1141.08, 1143.08 of the Zoning Ordinance.

[8] Secs. 1139.06, 1141.06, 1143.06 of the Zoning Ordinance.

between C-2 and C-3 uses" against which petitioners argue on p. 10 of their Petition.

The Middletown ordinance basically differs very little from the Euclid ordinance, which is set out in its entirety in Vol. 3, pg. 1939, James Metzenbaum, 2nd Edition, "Law of Zoning."

As to the Euclid ordinance, Mr. Justice Sutherland, in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 wrote on pg. 381-382:

> "Class U-1 is the only district in which buildings *are restricted to those enumerated. In the other classes the uses are cumulative;* that is to say, *uses in U-2 include those enumerated in the preceeding class,* U-1; Class U-3 includes uses *enumerated in the preceding classes*, U-2 and U-1; and so on. . . ." (Emphasis ours)

He then points out the height regulations in the various districts and the area requirements in these, and then says:

> "The ordinance contains, in great variety and detail, provisions in respect of *width of lots, front, side and rear yards, and other matters. . . ."* (Emphasis ours)

It is also noted that the Ohio law under which the Middletown ordinance was passed (in 1968) was *exactly the same* as that which was in effect when the *Euclid* ordinance was pasesd (circa 1925,) and the same factors involved in the plan of that ordinance were involved in the Middletown Ordinance.[9] It is these factors which have determined the "comprehensiveness" of the zoning ordinance,[10] respondents say, notwithstanding petitioners' footnote 4 on p. 10 of their Petition.

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[9] Ohio Revised Code Sections 713.07, 713.08, 713.09 and 713.10.

[10] Webster, "New World Dictionary," defines "comprehensive" as "covering many details."

2. The Middletown Zoning Ordinance is in accord with the test set out in Nectow v. Cambridge, 277 U.S. 183.

On p. 11 of their Petition petitioners say:

> "Further, the *extremely limited* uses permitted in a C-2 zone, vis-a-vis those in a C-3 zone, have effectively confiscated the Petitioner's property rights and deprived Petitioner of its basic liberty to develop its property in a manner which could be reasonably related to the public health, safety, morals and welfare of the general public." (Emphasis added)

Never, at any time during the course of this Case, have petitioners shown, or sought to show, *that the property cannot be feasibly and economically used* for the C-1 and C-2 uses, enumerated earlier herein, for which it is zoned and which, it is submitted, are not "extremely limited." In fact, the record shows that one of the tenants in its building (of the three therein) is an A & P store (a permitted use) and that in the course of constructing the building petitioner Kittyhawk substituted for a drug store (a permitted use) the petitioner Esco Distributing Co. In short, its building, *which is itself proper under the zoning ordinance,* is amenable to the many proper and profitable commercial uses allowed it under the ordinance.

On this point, Mr. Justice Sutherland, in *Nectow* v. *Cambridge,* 277 U.S. 183, wrote that to zone property for a purpose "for which it *cannot be profitably used* comes

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10 (Continued)

Also, *Miller* v. *Board of Public Works,* 195 Cal. 477; 38 A.L.R. 1479 (cited favorably by this Court in *Zahn* v. *Board of Public Works,* 274 U.S. 325) wherein the California Supreme Court speaks of it as the "scheme of zoning")

And *Pritz* v. *Messer,* 112 Ohio St. 628, wherein (Syllabus 1) the Ohio Supreme Court speaks of the "comprehensive plan" involving all these factors.

within the ban of the 14th Amendment." A fortiori where property has been zoned for a purpose or purposes for which it *can be profitably used,* as a part of a comprehensive plan to zone the entire city, which includes all the factors mentioned earlier herein, such act promotes the public health, morals, safety and general welfare of all the residents of the city and does not come within that ban. See: *Zahn* v. *Board of Public Works,* 274 U.S. 325.

3. Similarity between respondents' property and property in another zoning district is not a criterion of equal protection where a comprehensive zoning ordinance is concerned.

On p. 11 of their petition, petitioners decry the C-2 classification of the district in which their property is located, because a less restricted (C-3) district lies to the north across Grand Avenue (their sketch p. 6).

The trial judge, p. 43-44 of their Appendix, found the two districts to be similar in their physical natures and said:

> "Zoning laws must be impartially applied as to *all properties which are similarly situated."* (Emphasis ours)

These commercial districts, the record shows, notwithstand petitioners' footnote 6 on p. 12, are situated in the heart of the City's residential areas. McQuillen, "Municipal Corporations", 1965 revised Vol. 8, Section 25.115, says:

> "it is within the discretion of a municipal legislative body to *determine the boundaries* of shopping and business centers *in residential districts* and to determine *whether a business center in a residential district should be enlarged;* courts will not interfere with the

> exercise of such discretion except for clear abuse. *The mere fact that an owner may enjoy greater benefits, or that his property will be enhanced in value, if the size of the center is increased, cannot entitle him to compel the allowance of such increase in size.*" (Emphasis ours)

Having this discretion to determine to place a commercial zone in a residential area, it is submitted that it necesarily follows that the legislative authority has the further discretion to place *different categories* of commercial zones within that residential area. McQuillen, "Municipal Corporations", 1965 Revised Volume 8, Section 25.112 says:

> "It is customary and proper, particularly in large cities in which there are numerous business enterprises, to classify commercial districts according to the extent of restrictions against business, industrial and mercantile uses. For example, commercial districts may be divided into classes lettered from "A" to "D" *according to the restrictions to which they are subject.* An ordinance may establish a "medium volume business zone," "local business (as distinguished from general business) zone, a combined commercial-residential zone, or the like." (Emphasis ours.)

and in the 1972 Cumulative Supplement to that Volume, Section 25.112:

> "It has been *universally* held that a city can establish *more than one type* of commercial or business district" (Citing *Blacklidge* v. *Gulfport* 223 So. 2d 530) (Emphasis ours.)

Zahn v. *Board of Public Works* 274 U.S. 325, cites the California Supreme Court in *Miller* v. *Board of Public Works*, 195 Cal. 477; 38 A.L.R. 1479. That Court held, among other things:

"The objection to the ordinance as unjust and discriminatory because of the fact that property in *adjacent territory* is included in zone C (business) is not well taken . . . the mere fact that *outside* of the . . . district there was *other property similar in nature and character* would not justify the court, upon ascertaining that fact, to substitute its judgment for the legislative judgment. *The boundary line of a district* must always be more or less arbitrary, for the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of the line. (Emphasis ours.)

"*Somewhere the line of demarcation must be drawn* and it is primarily to the province of the municipal body to which the zoning function is committed to draw that line of demarcation and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested, in the absence of a *clear* showing of an abuse of that discretion. . . ." (Emphasis ours).

4. Under the circumstances of this case, the city should not be estopped to challenge the unauthorized acts of its agents.

It would seem that where Petitioner Kittyhawk's agent, though admonished to see the Zoning Administrator and "clarify the Esco use" at the time he received the amended building permit to house the Esco use, wilfully failed to do so, Petitioners should not be permitted to say that the City is estopped from challenging the wrongful issuance of the permit by its own agent. By its act, or failure to act, Petitioner Kittyhawk has placed itself in its present position.

But even were the above not so, the City should not be estopped.

In 119 A.L.R. 1503 is an extended annotation on this subject wherein it is said:

> "Most of the cases are to the effect that a municipality is not precluded from enforcing a zoning regulation *by the fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening the terms of such regulation; and this notwithstanding that the holder of the permit has proceeded thereunder to his detriment before the municipality seeks to enforce the regulation against him.*" (Emhasis ours)

Petitioners cite the case of *Dobbins* v. *Los Angeles,* 195 U.S. 223 (1904), as their chief argument for estoppel. There, however, the City had adopted an ordinance which *permitted the property owner to build her business* on the property in question. After she had obtained a permit from the City's proper officials and had commenced construction, the City amended the ordinance to exclude her property from the area in which such a business could be constructed. This court held that she was protected by the 14th amendment.

In *McGuire* v. *Reardon,* 255 U.S. 271 (1920), the property owner had constructed a building *in violation of the ordinance in effect* at that time and this court held that the 14th amendment did not prevent municipal authorities from requiring the building to be destroyed.

It is submitted that *Dobbins* does not apply here, but the principle in *McGuire* does apply. In *Dobbins* the property owner was given a right by law (the ordinance) which, once vested by reason of her commencing construction, could not be taken away. In *McGuire* the property owner was never given the right by law, but, rather, was forbidden by ordinance to construct the building.

CONCLUSION

The three leading cases on the subject of zoning in this country are *Euclid* v. *Ambler, supra,* which established that a city can divide its territory into separate zoning districts for single-family residences, apartments, business and industry; *Zahn* v. *Board of Public Works, supra,* which determined that such an ordinance, as it applied to a single owner and his property, would be held valid when not oppressive to his property and *Nectow* v. *Cambridge, supra,* in which it was determined that such an ordinance would be held invalid as to an owner and his property where he could make no suitable use of that property for the purposes for which it had been zoned.

The Ohio Supreme Court, in *Pritz* v. *Messer,* 112 Ohio St. 628 (1925), in syllabus 2, said:

> "An ordinance enacted by a municipality under Article XVIII, Section 3, of the Ohio Constitution, and under Sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to *a comprehensive plan* which, in the interest of the public health, public morals, *regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence, or other specific uses, the height, bulk, or location of buildings and other structures* thereafter to be erected or altered, including the *percentage of of lot occupancy, setback building lines* and *the area of yards* courts and other spaces, and for such purpose divides the city into zones or districts of such number, shape, and area as *are suited* to carry out such purposes, and provides a method of administration therefor, and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment." (Emphasis ours)
>
> (Note: Sections 4366-1 to 4366-12 of the General Code are now Sections 713.01 to 713.12, Revised Code.)

Here the City has enacted an ordinance which regulates not only uses, but also location of buildings, height, bulk, percentage of lot occupancy, setback building lines and area of yards, all according *"to a comprehensive plan"* as contemplated by the Ohio Supreme Court in that syllabus.

That comprehensive plan called for a C-3 zone in this particular area, with "buffer" areas between it and the surrounding residential areas, comprised of C-2 and C-1 zones, in the interests of the public health, safety, morals and general welfare. On this point, the Ohio Supreme Court, in *Willott* v. *Beachwood*, 175 Ohio St. 557, said:

> "The determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance, to the judgment and discretion of the legislative body. *Where such a judgment deals with the control of traffic, volume of traffic, effect upon valuation of property, municipal revenue to be produced for the city, expense of the improvement, land use consistent with the general welfare and development of the community planning as a whole, or, in short, where the judgment is concerned with what is beneficial or detrimental to good community planning it is in the first instance a legislative and not a judicial matter. The legislative, not the judicial authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable."* (Emphasis ours)

The petitioners would have these C-1 and C-2 zones declared invalid and would have all of the resultant commercial area used for C-3 purposes, "serving the entire city or a major portion thereof." The increased volume, burden and control of traffic which then would descend upon the surrounding residential areas would be un-

manageable and totally inimical to the public health, safety, morals and general welfare.

It is respectfully submitted that the federal questions raised in the Ohio courts in this case were decided by them in a way which is in accord with applicable zoning decisions of this Court.

Likewise, as to the City's being estopped by the wrongful acts of its agents, it is respectfully submitted that the State courts' decision was in accord with decisions of this Court on that subject.

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